IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1978

LARRY JOE DOOLEY,
PETITIONER :

-versus- : CASE # 78-338

STATE OF GEORGIA,
RESPONDENT :

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF GEORGIA

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ATTORNEY FOR PETITIONER

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LIST OF AUTHORITIES CITED



LIST OF AUTHORITIES CITED (CONT.)

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FROM THE COURT OF APPEALS

OF THE STATE OF GEORGIA

Petitioner respectfully prays that a Writ of Certiorari issue to review the Final Order of the Supreme Court of Georgia denying a Writ of Certiorari entered on May 24, 1978, and the Judgment of the Court of Appeals of the State of Georgia entered on March 14, 1978.

## OPINION BELOW

The Order of the Supreme Court of Georgia denying the Writ of Certiorari from the Opinion and Judgment of the Court of Appeals of Georgia was not accompanied by an official opinion (see Appendix B), but the Court of Appeals of Georgia wrote an official opinion dated March 14, 1978, which is recorded at 144 Ga. App. 539 (1978), and the Court of Appeals of Georgia denied a Motion for Rehearing on March 31, 1978 (see Appendix A).

## JURISDICTION

The Final Order of the Georgia Supreme Court denying the Writ of Certiorari was made and entered on May 24, 1978. Since substantial federal questions arising under the Constitution of the United States are involved in this case, the jurisdiction of this Court is invoked under the provisions of Article III, Sec. 2, of the Constitution of the United States, 28 United States Code §1257(3), and Rule 19(1) of the Rules of the United States Supreme Court.

## QUESTION PRESENTED

Were the rights of the Petitioner as outlined under the Fourth and Fourteenth Amendments to the Constitution of the United States violated by the investigating officers illegal search and seizure of evidence tendered and admitted at the trial of the case resulting in the Petitioner's conviction.

## CONSTITUTIONAL PROVISIONS INVOLVED

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

## STATEMENT OF THE CASE

The facts necessary to place in its setting the question now raised can be briefly stated as follows:

A. STATEMENT OF PLEADINGS IN THE CASE:

The Petitioner, LARRY JOE DOOLEY, was indicted on Indictment #5097 in the Superior Court of Chattooga County, Georgia, and the Indictment charges in Count Two that the said LARRY JOE DOOLEY "did unlawfully possess a certain motor vehicle...in which the manufacturer's serial number had been removed and altered for the purpose of concealing and misrepresenting the identity of such motor vehicle contrary to the laws of said State, the good order, peace and dignity thereof." The Petitioner was charged under the terms and provisions of GA CODE ANNO. §68-9916 (a) and (c).

On August 13, 1978, prior to the trial of the case, the Petitioner filed a Motion to Suppress Evidence, which Motion alleged that on the 9th day of April, 1976,



Gary McConnell, the sheriff of Chattooga County, Georgia, together with other persons, entered upon the property of the Defendant in Chattooga County, Georgia, and said persons searched, seized and removed from the Defendant's property certain automobiles and other evidence without the authority of a warrant of any kind or nature having first been previously procured by any magistrate. The Motion to Suppress further alleges that the search, seizure and removal of automobiles from the Defendant's property was an unlawful and illegal search and seizure and in violation of the Defendant's constitutional rights and amounted to an invasion of privacy without due process of law, and that said illegal search and seizure was improper and illegal. The Motion to Suppress Evidence was entertained and heard by the Trial Court on August 16, 1976, and after evidence and argument had been presented, the same was overruled and denied. (Motion to Suppress Hearing Transcript, p. 24) (R. 12-14)

B. STATEMENT OF FACTS: At the hearing on the Petitioner's Motion to Suppress Evidence held on August 16, 1976, the State of Georgia called one

witness, Sheriff Gary McConnell, of Chattooga County, to testify with respect to the seizure of a 1975 Chevrolet Impala automobile located on the used car lot of the Petitioner, which car and automobile is the basis of the charge and conviction now pending against the Petitioner.

Sheriff McConnell testified that during the morning hours of April 9, 1976, he, along with Special Agent, Bill Burns, of the Federal Bureau of Investigation, went to the Petitioner's used car lot located in Chattooga County. (Motion to Suppress Transcript pp. 2-3) Sheriff McConnell testified that his reason for going to the used car lot of LARRY JOE DOOLEY was to investigate a stolen Cadillac automobile that had been recovered earlier on April 9, 1976, at another location. (Motion to Suppress Transcript, p. 3)

The witness, McConnell, testified, in giving a reason for going to the used car lot of the Petitioner, that he had information that would lead him to expect that LARRY JOE DOOLEY might in fact be in possession of other stolen motor vehicles. (Motion to Suppress Transcript p. 19)

Sheriff McConnell also testified at the hearing on the Motion to Suppress, that upon arriving at the



used car lot of the Petitioner, and after entry onto the Petitioner's premises, he observed several automobiles on the lot, including a 1975 Chevrolet Impala. The motor vehicle in question was on the left hand side of the lot and the mobile home office of the Petitioner was on the right hand side of the lot. (Motion to Suppress Transcript, pp. 6, 23) With respect to the 1975 Chevrolet Impala, the Sheriff noticed after he got out of his car and "started to the office" that the driver's door was open and the dash was partly removed from the car, being back from the windshield approximately 4-to-6 inches. (Motion to Suppress Transcript, pp. 6-7) The Sheriff also noticed that there were some screwdrivers lying in the seat of this vehicle and that the serial plate on the dash of the vehicle had been removed. (Motion to Suppress Transcript, pp. 6-7) The Sheriff then checked to see if this particular 1975 Chevrolet Impala had been stolen and determined that it had been stolen on April 2, 1976, in Dade County, Georgia. (Motion to Suppress Transcript, p. 7) After examining this particular vehicle, the Sheriff then went into the glove compartment of the

automobile and seized certain papers with the true owners name, Bernard Doyle, shown on them. (Motion to Suppress Transcript p. 10)

Sheriff McConnell then proceeded to check several other automobiles located on the Petitioner's used car lot by examining the VIN No. located in various positions on these automobiles and subsequently discovered that these automobiles had been reported stolen also. The 1975 Chevrolet Impala, along with these other cars and trucks observed by Sheriff McConnell were seized. (Motion to Suppress Transcript pp. 10-15) At the trial of the case, evidence of the seizure from the Petitioner's premises of the 1975 Chevrolet Impala, charged in the indictment, and a 1974 F-100 black Ford pick-up truck was introduced against Petitioner in the presence of the jury. (T. 69, 88)

## REASONS FOR GRANT OF WRIT OF CERTIORARI

**WERE THE RIGHTS OF THE PETITIONER AS OUTLINED UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES VIOLATED BY THE INVESTIGATING OFFICERS ILLEGAL SEARCH AND SEIZURE OF EVIDENCE TENDERED AND ADMITTED AT THE TRIAL OF THE CASE RESULTING IN THE PETITIONER'S CONVICTION.**



In Division Three of the Court of Appeals Opinion (see Appendix A), the Court holds that the seizure "of the vehicle involved" in this case falls within the purview of the Plain View Doctrine as set forth in applicable Federal and State Court decisions. Petitioner asserts that the Court of Appeals has decided a federal question of substance not in accord with the applicable decisions of this Court. This Court should grant the Writ of Certiorari to correct the error of the Court of Appeals and Supreme Court of Georgia in allowing the rights of Petitioner on the Fourth and Fourteenth Amendments to the United States Constitution to be flagrantly violated.

Petitioner argues that the Plain View Doctrine is clearly inapplicable under the facts of this case. In the trial of the case before a jury, the State of Georgia introduced evidence of the 1975 Chevrolet Impala automobile and a stolen 1974 black Ford pick-up truck, which were seized from Petitioner's business lot by the Sheriff of Chattooga County, Georgia, and an F.B.I. agent. (T. 69, 68) In its opinion, the Court of Appeals overlooked that not only the 1975 Chevrolet was seized, but several vehicles were

seized in the search and justified all the seizures under the Plain View Doctrine as an exception to the warrant requirements.

In 1971, the Supreme Court of the United States in COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (91 S. Ct. 2022) stated in its opinion:

> "Thus the most basic constitutional rule in this area is that 'searches conducted outside the judicial process without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn' and there must be 'a showing by those who seek exemption... that the exigencies of the situation made that course imperative.' 'The burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and



> the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts ...If the times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." COOLIDGE, supra, 91 S. Ct. 2022, 2032

The Plain View Doctrine states that it is constitutionally permissable for law enforcement authorities to seize evidence which they come upon inadvertently during a valid prior intrusion. The essential elements of a valid warrantless seizure of evidence under the Plain View Doctrine are that there has been (1) a prior valid intrusion, (2) leading to an inadvertent sighting, (3) of items immediately apparent as evidence. (26 Mer. L. Rev. 1047) (1975) The Petitioner asserts that the first two requisites of a valid prior intrusion and the inadvertent discovery of evidence are not present in the case.

In looking at the requirement of a prior valid intrusion to justify a plain view seizure, it is apparent in the case sub judice that the Court of Appeals relied upon the premise that the premises searched was a public business. The Court of Appeals erroneously ruled that the public business property of Petitioner could be subjected to Sheriff McConnell's perusal without a warrant even though he admitted that he went to the Petitioner's place of business "looking for him" and that he had information that Petitioner had other stolen motor vehicles. (Motion to Suppress Transcript p. 19)

There were three intrusions which violated the Petitioner's Fourth and Fourteenth Amendment rights, neither of which can be said to have a prior justification, so as to meet the requirement under the Plain View Doctrine. First, there was the intrusion onto the business property of Petitioner, and, second, there was an intrusion into the 1975 Chevrolet motor vehicle itself. Third, there was an intrusion into the Ford pick-up. It is important to remember that the Sheriff went to the Petitioner's place of business without a warrant of any kind although he had information that



Petitioner might be in possession of other stolen motor vehicles after having already discovered one earlier at a prior location. (Motion to Suppress Transcript, pp. 2, 3, 19) He was not going there as an ostensible buyer of any of Petitioner's merchandise or as a member of the public at large! There was absolutely no testimony which upholds the proposition that the motor vehicle was on sale or out in the open for everyone to see as was the case in SEWELL V. STATE. 238 Ga. 495 (1977) and STATE V. SMALLEY, 138 Ga. App. 747 (1976). On the contrary, it was on Petitioner's premises and was obviously being worked on at the time of the seizure to the left of the office.

In dealing with the intrusion into the two motor vehicles and the alleged plain view seizures of evidence contained in or about said automobiles, there was obviously no prior valid intrusion into either of the motor vehicles prior to spotting the seizeable objects, as for example, was done in HARRIS V. UNITED STATES, 390 U.S. 234 (88 SC 992, 19 LE2d 1067), which dealt with a proper inventory search of an impounded automobile and which theory has been adopted

by this Honorable Court and the Court of Appeals in BROWN V. STATE, 235 Ga. 644 (220 SE2d 922) and LEE V. STATE, 129 Ga. App. 82 (198 SE2d 720).

The Petitioner contends that there was no prior valid intrusion into either of the motor vehicles with respect to the items seized in or about the automobiles in the case sub judice. The Petitioner submits that the State must show that entry into the automobiles was performed and justified before the evidence was spotted or viewed. This was not done in regard to either the Chevrolet or the Ford. To justify this, it must be determined whether the officer had a right to be looking into the vehicle; then determine that what he saw provided him with probable cause for a search of the automobile or a seizure of evidence within it; and, finally, if probable cause existed after a justified view, it must be determined if there was authority on the part of the officer to enter the automobile without a warrant, either for the protection of the officer, or because of exigent circumstances which threatened the destruction or removal of the evidence or under any other recognized exception to the warrant requirement.



Using this analytical approach and applying it to the evidence in the case sub judice, there was the testimony of Sheriff Gary McConnell, who went to the used car lot of the Petitioner in the morning hours of April 9, 1976, after investigating and discovering a stolen motor vehicle at another location, which through information he had learned belonged to the Petitioner. (Motion to Suppress Transcript pp. 2-3) It was the further testimony of the witness, McConnell, that he did not procure a search warrant to go upon the premises of the Petitioner and to inspect any of the vehicles eventually seized. (Motion to Suppress Transcript p. 22)

Therefore, Sheriff McConnell and F.B.I. Agent Burns, under the present analysis, and through their testimony, may have had a right to be at or near the 1975 Chevrolet Impala motor vehicle, which was the basis of the charge against Mr. Dooley, and the two officers may have had probable cause for a search or a seizure of the motor vehicle in question based on what they saw, but, certainly, even if the two men had a right to be where they were and had sufficient reason to form probable cause for a search or a

seizure of evidence on the automobile, they had no authority whatsoever to enter the automobile because they had no warrant, nor did they have any reason to enter and search for the protection of the two officers, nor was there any exigent circumstances which would threaten the destruction or removal of the automobile or any of the items contained therein. It would have been just as easy after viewing the condition of the 1975 Chevrolet Impala to simply leave one officer at the scene while the other sought a justice of the peace of another authorized magistrate and made an application upon affidavit for a search of this particular automobile. There was no testimony which in any way justified the warrantless seizure of the Ford pick-up evidence which was introduced in the trial.

Therefore, the Petitioner contends that under the analysis above the seizure of the automobiles in question was performed in violation of his constitutional rights as outlined under the Fourth and Fourteenth Amendments to the United States Constitution and as alleged in the Motion to Suppress, and the Trial Court erred in overruling and denying the Motion to Suppress.



The second requirement under the Plain View Doctrine is that the evidence be seen inadvertently. The inadvertence requirement, as outlined in COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443, has been adopted by the Appellate Courts of Georgia, as seen in HARP V. STATE, 136 Ga. App. 897, 899 and EAGERTON V. STATE, 134 Ga. App. 637, 641 (215 SE2d 479) as well as LOWE V. STATE, 230 Ga. 134, 136 (195 SE2d 919). It is in this requirement that the Court of Appeals Opinion is in grave error! In LOWE, this Court outlined the requirement of inadvertence and stated:

> "Here, as in the Coolidge case, the circumstances are clear in disclosing that the incriminating evidence came into the possession of law enforcement authorities inadvertently and unmotivated by any desire to locate incriminating evidence by any unlawful search and seizure." (p. 136)

Given that inadvertence is an essential element for a plain view seizure, the next question, Petitioner contends, is what the test of inadvertence should be. In

looking at the above-cited cases, it appears that in none of them did the officers have probable cause to believe that the particular items seized would be uncovered, and, therefore, it might be reasonable for a "probable cause" standard to be used in determining whether inadvertence exists or not. In other words, if a police officer has probable cause to believe that he will discover a certain item of evidence before observing and seizing it under the Plain View Doctrine, then the seizure cannot be inadvertent and the justification provided by the requirements of the plain view seizure could not stand and the evidence should be suppressed.

The probable cause test for negating inadvertence has been expressed in COMMONWEALTH V. WALKER, 350 NE2d, 678, 686 where the Court stated:

> "Only evidence which the police did not anticipate or know to be at the locus of a search will be seized without a warrant. When the Plain View Doctrine is relied upon to justify a warrantless seizure of evidence, attention must be paid also to seeing that the police in full possession of probable cause to believe



> that incriminating evidence was present at a particular place have not waited until an opportune moment to 'place themselves in a position to gain a plain view of the evidence.'"

In further explaining the inadvertence requirement, the Court in BROWN V. STATE, 15 Md. App. 584, 609 stated that the inadvertence requirement should be applied to "prevent the police from using an entry into a 'constitutionally protected area'...for any... legitimate purpose...as a mere subterfuge for a 'plain view' reconnoitring, it may not be a contrived investigatory reconnaisance aimed at abating the warrant requirement for a search or seizure. It may not be a planned 'plain view.'"

In applying the inadvertence requirement for a plain view seizure, to the facts sub judice, Petitioner contends that when Sheriff Gary McConnell and Agent Bill Burns went to the used car lot of the Petitioner, they knew before entering his premises that they would be examining motor vehicles located on his lot and had a suspicion that amounted to probable cause that stolen cars would be located on his lot. Sheriff McConnell

stated that he had information that would lead him to have a suspicion that Larry Joe Dooley might in fact be in possession of such other vehicles (Motion to Suppress Transcript p. 19) which directly expresses the suspicion or probable cause that Sheriff Gary McConnell had in his mind to examine other vehicles when he went to the Petitioner's lot.

Under the cases cited above, Petitioner contends that the suspicion and probable cause in the Sheriff's mind and F.B.I. agent's mind at the time they went to and entered upon the Petitioner's property negated the inadvertence requirement of a plain view seizure, therefore requiring the two officers to obtain a search warrant for the seizure of any items that they believed to be on the private property of the Petitioner and because they did not obtain such a warrant, and because the seizure cannot be justified under the Plain View Doctrine, the Motion to Suppress should have been sustained. The factual situation presented by this case is a glaring example of a "planned 'plain view.'"

The Court of Appeals in its Opinion relied upon MAHAR V. STATE, 137 Ga. App. 116 (2B) (223 SE2d 204) as authority for affirming the Trial Judge's denial



of the Motion to Suppress in this case. The MAHAR case is clearly distinguishable inasmuch as the truck involved in that case "was not within the curtilage nor in a garage or otherwise secreted..." but was parked in a public parking lot 150 feet from the Defendant's apartment. The problem in the Court of Appeals entire analysis of the case sub judice is that the Court of Appeals has attached legal significance to the seizure of evidence, some of which was in plain view, but which was not properly seized under the Plain View Doctrine, which confusion must be settled by this Court. In COLLIDGE V. NEW HAMPSHIRE, supra, the U.S. Supreme Court stated it clearly:

> "But it is important to keep in mind that, in the vast majority of cases, any evidence seized by police will be in plain view, at least at the moment of seizure. The problem with the Plain View Doctrine has been to identify the circumstances in which plain view has legal signifance rather than being simply the concomitant of any search, legal ot illegal (see cases cited).

"What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused...The 'Plain View' Doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." COOLIDGE, supra, pp. 2037-2038.

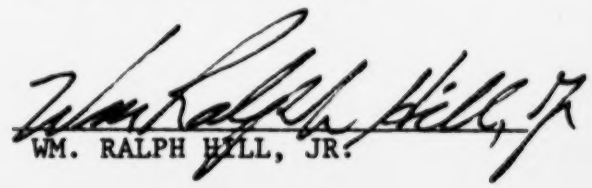
## CONCLUSION

In conclusion, with respect to this reason for the granting of the Petition for Writ of Certiorari, Petitioner argues that the evidence does not support a Plain View seizure under the Fourth and Fourteenth Amendments to the United States Constitution in that there was no prior valid intrusion onto the premises and into the two motor vehicles involved and that the Sheriff and F.B.I. agent did not discover the evidence which was introduced at the trial of the case inadvertently.



Therefore, under the Fourth and Fourteenth Amendments to the United States Constitution, it was necessary for the officers to obtain a search warrant for the seizure of the items since they were "looking" for Petitioner and had reason to suspect he had other stolen cars on his lot, and because this was not done, the Trial Court erred in denying and overruling the Motion to Suppress; the Court of Appeals erred in affirming the decision of the Trial Court and denying a rehearing on the matter and the Supreme Court of the State of Georgia erred in denying the Writ of Certiorari from the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED,



WM. RALPH HILL, JR.
ATTORNEY FOR PETITIONER

Attorney at Law
P. O. Box 1350
LaFayette,
Georgia 30728

MARCH 14 1978

55220 DOOLEY V. THE STATE

SHULMAN, Judge.

Defendant appeals from his conviction for possession of a motor vehicle with the identifying number removed. See Code Ann. § 68-9916 (a) (c).

1. The indictment charging Defendant with the crime stated that the accused "did unlawfully possess a certain motor vehicle...from which the manufacturer's serial number had been removed and altered for the purpose of concealing and misrepresenting the identity of such motor vehicle, contrary to the laws of said State," etc. Defendant's demurrer to the indictment was overruled. It is urged that the Court erred in overruling the demurrer because the indictment failed to allege that the Defendant possessed the vehicle with knowledge of the alteration or removal of the manufacturer's serial number.

While it would have been better practice to recite the words "knowingly possessed" in the indictment (see, e.g., DANIEL V. STATE, 118 Ga. App. 370 (1) (163 SE2d 863), the failure to have done so does not render the



indictment subject to demurrer. GOODWYNE V. STATE, 38 Ga. App. 183 (143 SE 443).

2. The Trial Court charged the jury in substantially the same language of Code Ann. § 68-9916 (a). In the general charge, the Court failed to charge the substance of Code Ann. § 68-9916 (c) which prohibits a "knowing violation." Defendant enumerates as error the Court's failure to instruct the jury adquately as to the necessary elements of the offense charged, to wit: that the accused must have knowledge of the alteration.

We agree with appellant that guilty knowledge of the alteration is the gist of the offense. GREER V. STATE, 113 Ga. App. 342 (1) (147 SE2d 877). See also STUDDARD V. STATE, 124 Ga. App. 713 (185 SE2d 775) (likening offense of possessing and using motor vehicle license plate for the purpose of concealing and misrepresenting identity of motor vehicle upon which it was being used to offense of receiving stolen goods). The Trial Court communicated the essential element of the offense to the jury when, on recharge,

the jury was instructed that they "would have to find beyond a reasonable doubt that he did possess it with the intent to do what they charged him with doing, that he intended to possess it and he knowingly possessed it."

The Trial Court's failure to charge in its original instructions that a knowing violation was an essential element of the offense was immaterial in light of the recharge. POTTS V. STATE, 134 Ga. App. 512 (4) (215 SE2d 276).

3. Appellant contends that the Trial Court erred in denying his motion to suppress evidence resulting from the search of the vehicle involved in the case at bar.

The evidence shows that the vehicle seized was in Defendant's used car lot, which was open to the public. Law enforcement officials went to Defendant's place of business during business hours for the purpose of investigating the theft of a stolen vehicle which was found elsewhere and was reported to belong to Defendant. The officers observed, in plain view, a vehicle on Defendant's lot with the driver's door open



the dashboard removed, screwdrivers on the front seat, and the dashboard serial plate missing. A subsequent check of the car revealed that the car in fact was stolen.

The Court did not err in denying the motion to suppress. MAHR V. STATE, 137 Ga. App. 116 (2b) (223 SE 2d 204).

Judgment affirmed. BELL, D. J., and BIRDSONG, J., concur.

SUBMITTED JANUARY 30, 1978 - DECIDED MARCH 14, 1978

REHEARING DENIED MARCH 31, 1978 - CERT. APPLIED FOR.

Motor vehicle violation. Chattooga Superior Court. Before Judge COKER.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, May 24, 1978

Dear Sir:

Case No. 33737 DOOLEY V. STATE

Ths Supreme Court today denied the Writ of Certiorari in this case.

Hill, J., dissents.

Very truly yours,

s/Mrs. Joline B. Williams
Clerk



## CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the within and foregoing Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia upon the following by placing a copy of same in an envelope properly addressed to him and depositing same in the United States Mail with sufficient postage thereon to reach its destination, to wit:

The Honorable William Campbell
District Attorney
Walker County Courthouse
LaFayette, Georgia 30728

This 18th day of August, 1978.

Wm. Ralph Hill, Jr.
ATTORNEY FOR PETITIONER